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IN THE SUPREME COURT
OF THE STATE OF UTAH

In the Matter of the Estate of
LESTER R. THORLEY,

Deceased,

THOMAS J. THORLEY,

Plaintiff-Appellant,

v.

WILLIAM R. THORLEY,

Defendant-Respondent.

FOR DEFENDANT-RESPONDENT:

ORVILLE ISOM, ESQ.
79 West Harding
Cedar City, Utah

FILED

DEC 14 1954

1 THOMAS E. MILLER, ESQ.
2 HIGGS, FLETCHER & MACK
3 1800 HOME TOWER - 707 BROADWAY
4 SAN DIEGO, CALIFORNIA 92112
5 TELEPHONE: (714) 236-1551
6 ATTORNEYS FOR APPELLANT

REX E. MADSEN, ESQ.
SNOW, CHRISTENSEN & MARTINEAU
7TH FLOOR CONTINENTAL BANK BLDG
SALT LAKE CITY, UTAH 84101
TELEPHONE: (801) 521-9000
ATTORNEYS FOR APPELLANT

7
8 IN THE SUPREME COURT
9 OF THE STATE OF UTAH

10 IN THE MATTER OF THE ESTATE OF) Probate No. 2763

11 LESTER R. THORLEY,

12 DECEASED.

13
14 THOMAS J. THORLEY,

15 Appellant

16 vs.

17 WILLIAM R. THORLEY,

18 Respondent.

19
20 APPELLANT'S OPENING BRIEF
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\$1

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HIGGS, FLETCHER & MACK
120 HOME TOWER • 707 BROADWAY
SAN DIEGO, CALIFORNIA 92112
(714) 236-1551

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INTRODUCTION

This is a Will Contest proceeding arising out of the Decedent's execution of two (2) separate testamentary documents, the first a 1964 will executed in California, and the second, a will dated May 19, 1975, executed in Cedar City, Utah. The earlier California will left the Decedent's entire estate to his two (2) brothers, Thomas and Melvin Thorley, both residents of California. The Utah will executed shortly before death left the entire estate to the Decedent's third brother William R. Thorley, a resident of Utah. At the date of death, the Decedent left the vast majority of his assets in California.

For thirty (30) years prior to death, except for the last six (6) months of his life, the Decedent resided in Escondido, California. During the remaining six (6) months of his life, he lived with his brother William in the latter's residence in Cedar City, Utah until he died on December 21, 1975.

The undisputed facts of the case establish that within two (2) days the Decedent's removal from Escondido, California to Cedar City, Utah on Sunday, May 18, 1975, his brother and sole beneficiary William R. Thorley, Respondent in this action, typed a will which left everything to himself. This will was executed and witnessed the same day. On the third day, May 19, 1975, Respondent contacted an attorney, Orville Isom, attorney of record in this action, to draft a will with the same provisions and appointing himself executor. The Decedent never saw the attorney prior to the attorney's drafting the will but spoke to him briefly on the phone that same day. This will was brought

1 by the attorney and his wife to the Respondent's residence
2 same day for the Decedent's signature.

3 The Respondent was present in the room during the entire
4 period of time that Decedent spoke with "his attorney" and
5 remained in the room until the Decedent executed the will.

6 At the time of his execution of the will, the Decedent was
7 a physically weakened condition following the trip from California
8 to Utah and was described by his physician as "weak and emaciated."
9 Lester Thorley was also suffering from an incurable form of
10 cancer with a limited time to live. He was in a mentally depressed
11 state and allegedly his will became sublimated to that of
12 Respondent.

13 STATEMENT OF FACTS

14 1. The Petition for Probate was filed by Respondent in the
15 District Court of Iron County, State of Utah, on December
16 1975.

17 2. After a Contest to the will was first filed by Respondent
18 in California, and on February 2, 1976, the Appellant, Thomas
19 Thorley, filed a Contest to the Petition to Probate in Iron
20 County.

21 3. On or about October 4, 1976, Thomas J. Thorley filed
22 Contest after Probate and the Appellant pursued this litigation
23 for over a year thereafter, conducting discovery, taking depositions,
24 in anticipation of trial. Designation of Record, page 2.

25 4. On November 10, 1976, a Motion was made by Respondent
26 to have a preliminary trial on issue of domicile. (Designation
27 Record on Appeal, Page 2).

1 5. On November 19, 1976, a Demand for Jury Trial on all
2 issues was made and filed in the District Court. (Designation
3 of Record on Appeal, Page 3, . See, P & As (Page 5).

4 6. On the 23rd day of November, 1975, a Motion to Stay
5 Proceedings or, in the alternative, for a Change of Venue and
6 a Motion to have the matter of domicile resolved by way of
7 trial by jury was filed in the District Court by the Appellant.
8 Points and Authorities in Support of this latter motion was
9 filed on or about December 15, 1976. (Designation of Record on
10 Appeal, Page 9).

11 These Motions were subsequently taken off calendar (Designa-
12 tion of Record on Appeal, Page 34) and continued until finally
13 set down for hearing on March 8, 1977, to be immediately fol-
14 lowed by a trial on the merits. (Designation of Record on Appeal,
15 Page 9, 10).

16 Notice of this Motion and of the trial, however, arrived
17 February 28, 1976, less than ten (10) days before the trial
18 and a Motion for Continuance was filed. (Designation of Record
19 on Appeal, Page 11).

20 7. On March 8, 1977, counsel for Appellant appeared as
21 ordered for a hearing on the Motions only to find a Pro Tem
22 Judge unwilling to consider the matters previously set. The
23 matters were thereafter rescheduled for hearing on May 23,
24 1977, to be immediately followed by trial on the merits.
25 (Designation of Record on Appeal, Page 12). Notice of this
26 trial date indicates that an advisory jury only would be
selected to hear the matter of domicile. This notice was mailed

1 the 29th day of March, 1977, affording counsel almost thirty,
2 days notice.

3 8. On May 23, 1977, the motion for a trial by jury as
4 opposed to an advisory jury on the domicile issue was heard
5 denied. After a four (4) day trial, the jury returned the
6 Special Interrogatories and the Court entered its Order that
7 the Decedent was domiciled in the State of Utah on the date of
8 his death. (Designation of Record on Appeal, Pages 17-18).

9 9. After the trial on domicile and on May 27, 1977, a trial
10 on the merits was taken off calendar when the District Court
11 became aware that its failure to admonish the jurors had resulted
12 in certain jurors discussing the issues amongst themselves.
13 No trial date was set at that time by the District Court and
14 counsel was advised that an appropriate trial notice would be
15 mailed out in due course.

16 10. On or about June 7, 1977, Points and Authorities were
17 filed in Support of Change of Venue Motion (Designation of Record
18 on Appeal, Page 15) based on certain matters that had developed
19 as a result of the previous trial.

20 11. On or about June 17, 1977, a Petition for Intermediate
21 Appeal was filed in the Supreme Court to request review of the
22 denial of pre-trial Motions. (Designation of Record on Appeal,
23 Pages 19-20).

24 12. On June 17, 1977, eleven (11) days before the date set
25 for trial, Notice was mailed out by the District Court advising
26 that on June 28, 1977, the trial on the merits of the Will
27 Contest would be heard. (Designation of Record on Appeal,

21). This Notice was received on June 20, 1977, eight (8) days before trial. Prior to that and on June 13, 1977, California counsel was advised by telephone through Utah co-counsel Mr. Michael Park of the Court's Order.

13. On the day before trial, June 27, 1977, the Utah Supreme Court denied the Appellant's Petition. (Designation of Record on Appeal, Page 22).

14. On June 28, 1977, pursuant to the Court's Order, the Appellant appeared by counsel in the District Court. At that time, a request was made that the Court, in view of recently discovered facts resulting from the former trial, change venue on the strong probability that local bias and prejudice existing in favor of Respondent William R. Thorley would prevent a fair trial.

15. In addition, a Motion for a short two-week continuance of the trial date was made so as to allow counsel in view of the brief trial notice received and the particular need for time, to arrange each of the witnesses from the State of California to be present in Iron County, Utah to testify. These witnesses totalled at least seven (7).

16. The Motion for Continuance was also based on the Supreme Court's denial of the Petition for an Intermediate Appeal the day before. (Designation of Record on Appeal, Page 22.) If granted, the Interlocutory Appeal would not only have stayed the trial court proceedings, but would also have alleviated the expense and necessity of producing the witnesses outlined above. The Motion for Continuance along with the Motion for

1 Change of Venue was denied and the Appellant ordered to go
2 forward with the trial by order of the Court on June 28, 1977
3 (Designation of Record on Appeal, Page 23).

4 17. Without the availability of witnesses and with the
5 burden of going forward, the Appellant herein respectfully
6 advised the Court that it had no choice but to withdraw entirely
7 from any further proceedings.

8 18. On June 29, 1977, in an uncontested proceeding, the
9 Court admitted the will to Probate and dismissed the Contest
10 entering Findings of Fact and Conclusions of Law. (Designation
11 of Record on Appeal, Page 24).

12 ARGUMENT

13 I

14 THE FAILURE OF THE DISTRICT COURT TO
15 GRANT A TWO-WEEK CONTINUANCE OF THE
16 TRIAL DATE RESULTED IN A DEPRIVATION
OF THE APPELLANT'S DUE PROCESS RIGHTS
AND AMOUNTED TO AN ABUSE OF DISCRETION.

17 The Fourteenth Amendment to the United States Constitution
18 Section 1, and Article I, Section 7 of the Utah Constitution
19 provides that judicial power must be exercised in conformance with
20 due process of law. "No person shall be deprived of life,
21 liberty, or property, without due process of law."

22 As stated by the Court in Jensen v. Union Pacific Ry. Co.
23 Utah 253, 21 P. 994, due process of law comes from the Great
24 Charter and is synonymous with "law of the land". It means
25 a party shall have his day in court.

26 In the Christiansen v. Harris case, 109 U. 1, 163 P. 23
27 the Court set forth the essentials of due process as, inter alia,

1 an inquiry into the merits of the question by a competent body,
2 notice to the person and the time at which such person should
3 appear, and fair opportunity to submit evidence and cross-
4 examine witnesses. Each of these means, which have as their
5 purpose, according to the Court, the protection and enforcement
6 of human rights, have the same basic requirements, whether the
7 case involves a criminal or civil proceeding.

8 The words, "life, liberty, and property" as embraced within
9 the due process clause are to be taken in their broadest sense
10 as indicative of the three (3) great subdivisions of all civil
11 rights. McGrew v. Industrial Comm., 96 U. 203, 85 P. 2d 608.
12 Thus, "property" is the right of any person to possess, use,
13 enjoy or dispose of a thing, and embraces all valuable interests
14 which a man may possess outside of himself. It is not confined
15 to mere tangibles, but extends to every species of vested right.
16 McGrew v. Ind. Comm., *supra*.

17 In this case, the Appellant, Contestant below, is heir to
18 the Estate of Lester R. Thorley and has by virtue of this interest
19 the right to a portion of the assets of the Estate in the event
20 he is able to prove the allegations of his Contest and thereby
21 declare the later Utah will invalid. It is a right which
22 therefore demands the rigors of due process.

23 While a trial court is apparently imbued with discretion to
24 manage its trial calendar and docket cases for trial, it may not
25 abuse that discretion where the facts plainly show that, despite
26 due diligence exercised by counsel for Appellant, the notice of
trial was insufficient to make the necessary arrangements. As

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indicated above, the District Court on May 27, 1977 took off calendar its scheduled trial on the merits with the assurance that reasonable notice would be afforded of the new trial date.

The Court was well aware at that time, by virtue of a previous four-day jury trial involving much of the same testimony that would support a trial on the merits, that the whole prosecution was based on witnesses that would have to be transported from southern California to southern Utah, a journey which takes a minimum eight (8) hour automobile drive or an almost equally gruelling airline schedule with no direct flight into Parowan or Cedar City, Utah from San Diego, California.

These witnesses included among others, the Decedent's long-time treating physician practicing in San Diego, one psychiatric expert also practicing in San Diego, two lay witnesses residing in North San Diego County who had contact with the Decedent shortly before he moved to Cedar City with Respondent and the Contestant and his immediate family, including his wife Claire Thorley, who was and still is suffering from a severe crippling case of rheumatoid arthritis and who because of such a problem, would need additional time to consult with a physician to obtain necessary medications, and recuperate from her previous journey to Cedar City during the week long trial ending May 1977.

All that was requested of the trial court was two (2) weeks to make these necessary arrangements. Prior to trial, counsel for Appellant had taken the precaution of deposing each of the witnesses, except his own expert in the event of their unavailability.

1 ability. But this Court is well familiar with the loss of effective-
2 tiveness generated by reading a deposition transcript to the
3 jury. See Beiras v. Johnson, 13 U. 2d 269, 383 P. 2d 375, 378
4 (1969).

5 This request by Appellant was precipitated in part by a
6 written notice from the Court mailed to counsel on June 17, 1977
7 only eleven (11) days before the date assigned for trial, June 28,
8 1977. Verbal notice was received on June 13, 1977 but again this
9 was not sufficient time to make all the necessary arrangements.

10 The requested continuance was also based on the fact that
11 Appellant was still awaiting the decision of the Supreme Court
12 on a Petition for Interlocutory Appeal which was filed with the
13 Supreme Court on June 17, 1977. If granted, the Order would have
14 stayed the trial court proceedings. The Petition was filed from
15 the Court's Orders of May 27, 1977 denying a right to trial by
16 jury and denying change of venue. The decision denying the
17 Petition was not rendered until the day before trial was to
18 commence, or on June 27, 1977.

19 This Notice of trial was particularly surprising to counsel
20 for Appellant in view of the previous trial notice which gave
21 almost thirty (30) days to make necessary arrangements. This was
22 the notice referred to in Paragraph 7 of the "Statement of Facts"
23 above.

24 The Motion for Continuance also advised the Court of pending
25 litigation in the State of California and of that Court's recent,
26 June 27, 1977 decision removing a prior Stay Order, finding that
the District Court of Iron County had indeed failed to accord the

1 Appellant minimum due process.

2 Despite what has been summarized above, the trial court
3 the motion and ordered the case to proceed to trial, witness
4 or not. Inasmuch as the Appellant had the burden of going
5 forward with the evidence, it was left with no alternative
6 to withdraw in silent resignation to the Court's decree.

7 In Bieras v. Johnson, 13 U. 2d 269, 372 P. 2d 375 (1962),
8 Court held the trial court abused its discretion in failing
9 accord plaintiff's counsel a five-week continuance despite the
10 Court's recognition that "some hardship [would have resulted]
11 the Defendants and others, . . ." (Id at 378). In so finding
12 Court held that the relative significance of these facts did
13 overshadow the potential loss to the Plaintiff who was unable
14 attend due to medical incapacity.

15 Just as the Court in Beiras found the Plaintiff's testimony
16 to be essential to the case there are equally compelling reasons
17 in a more complicated will contest proceeding for affording the
18 opportunity to produce the testimony of Appellant's out-of-state
19 witnesses.

20 Thus, it is a well known fact that the Decedent was a reclusive
21 living a miserly existence while at all times fireceely proclaiming
22 ing his independence. The only people he had contact with in
23 California immediately before his removal were his treating
24 physician, Dr. Warren Jacobs, his brother and Appellant, Thomas
25 Thorley, Appellant's wife, Claire Thorley, Thomas Thorley, and
26 the Decedent's residence home manager, Mrs. Patricia Cook.
27 Decedent's trailer park manager, Mr. Robert Oscar Charron.

1 The Decedent had no immediate family, was never married, was
2 retired and aged, 81 years, and never associated with or be-
3 friended anyone aside from those above-mentioned while he resided
4 in Escondido, California.

5 As such, their testimony concerning his physical and mental
6 status are vitally important. Coupled with the Supreme Court's
7 rejection the previous day of the Intermediate Appeal, and the
8 difficulties of arranging to transport these witnesses from
9 California on such brief notice, called for the Court's exercise
10 of its discretion to grant the brief two-week continuance as
11 requested. No prejudice inured to Respondent as a result of this
12 brief delay.

II

13 THE COURT ERRED IN FAILING TO CHANGE
14 THE PLACE OF TRIAL WHERE A STRONG
15 PROBABILITY OF JURY BIAS AND PREJUDICE
EXISTED IN FAVOR OF THE RESPONDENT.

16 On or about June 10, 1977, Points and Authorities in Support
17 of a Motion to Change Venue or the place of trial was filed in
18 the District Court, a true and correct copy of that has been
19 designated on Page 57 of the Designation of Record on Appeal.

20 The Utah Judicial Code §78-13-9 provides the grounds upon
21 which this Motion may be granted. In relevant part that statute
22 provides:

23 "The court may, on motion, change the place of
24 trial in the following cases:

25 . . . (2) When there is reason to believe that an
26 impartial trial cannot be had in the county, city
or precinct designated in the complaint.

(3) When. . . the ends of justice would be pro-
moted by the change. . . ."

1 In Anderson v. Johnson, 268 P. 2d 427 (Utah 1954), the
2 held that the change of venue statute should be liberally
3 construed particularly when it concerns the right to a fair and
4 impartial trial. Thus the Court held:

5 "The authority of a court to order a change of
6 place of trial existed as common law as part of
7 its inherent power to insure a fair and impartial
8 trial in dispensing justice . . . In extension of
9 these principals, most states including ours, have
10 provided statutes which should be liberally con-
11 strued to attain their objects. 268 P. 2d 430."

12 In further defining the right to a fair and impartial tri-
13 the Court in Anderson held:

14 "All laws have to do with the removal of action
15 from one local jurisdiction to another for a
16 trial have one definite purpose, that is to pro-
17 mote justice by avoiding local matters of a pre-
18 judicial nature that might be detrimental to the
19 rights of one of the parties. (Emphasis added)
20 268 P. 2d at 430."

21 The Utah statute as indicated in the compiler's note to
22 Section 78-13-9, is identical with the California statute, Cal.
23 of Civil Procedure §397. In City of Los Angeles v. Pacific
24 & Tel. Co., 164 Cal. App. 2d 253 (1958), the Court of Appeal
25 in California expressed its rationale for employment of the tri-
26 of the statute under similar circumstances:

27 " . . . The evident purpose is to guard against
local prejudices which sometimes exist in favor
of litigants within a county as against those
from without and to secure to both parties to a
suit a trial upon a neutral ground. . . . Obviously,
if both parties, whether a defendant be an indi-
vidual or a corporation, are 'within' the same
county either as a resident or doing business
therein 'local prejudice' or biases are not like-
ly to exist; and if in a given case there is a
probability that a disadvantage will result,
defendant is entitled to invoke the remedy under
section 397, Code of Civil Procedure, which

1 provides for a change of venue upon the ground of
2 inability to obtain a fair trial." Id at 257.

3 This Motion, along with the Motion for a two-week continu-
4 ance, came on for hearing on June 28, 1977. The Court at that
5 hearing was apprised of three (3) affidavits which for want of
6 time were not available at the time of the hearing. Nevertheless,
7 an offer of proof was made as to the contents of each of those
8 affidavits on the record and the Court, after hearing the same,
9 ruled that the affidavits may be filed belatedly but that he was
10 not convinced, based upon the contents of those affidavits, or in
11 any other matters presented at the time of the hearing, that
12 there was sufficient basis upon which to invoke the change of
13 venue statute.

14 These affidavits have been designated in the Appellant's
15 Record on Appeal on Page 72.¹ Of particular interest is the
16 affidavit of one Ion Bonzo, a former juror in the May trial on the
17 issue of domicile. Mrs. Bonzo had the benefit of four (4) days
18 of trial and numerous hours of deliberations before the verdict
19 was reached. This trial was held only one (1) month before this
20 Motion was made and the matters therein reflected in her affidavit
21 show without doubt the substantial prejudice inuring to the detri-
22 ment of the Appellant as an "outsider", a California domiciliary
23 to the benefit of the Respondent, a leading figure in the small
24 community from which the jury was polled, drawn, and ultimately
25 selected.

26 Mrs. Bonzo in part testifies in her affidavit as follows:

27 / / / / Ftnt. 1. Although those affidavits were stricken from the
record by the District Court, they were reinstated by Order of the
Supreme Court dated December 5, 1977, upon motion of Appellant.

1 "Although at the start, I honestly felt that
2 matters of local prejudice and bias as to Mr.
3 WILLIAM R. THORLEY and his well-known and
4 recognized name and position in this community
5 could be set aside, nevertheless, and now
6 considering what has gone before me in the
7 trial and the jury deliberations, that this was
8 an almost impossible task. During our delibera-
9 tions, for example, matters which were not in-
10 troduced by the attorneys through their witnesses
11 or documents became a part of those deliberations,
12 particularly, the aspects of wealth and reputa-
13 tion of WILLIAM R. THORLEY.

14 . . . I am totally convinced that an impartial
15 trial would in all probability be obtained only
16 in a county other than Iron County, Utah, which
17 draws its jurors from Cedar City."

18 What could be a greater testament to the veracity of the
19 allegations of bias and prejudice raised in the moving papers
20 before the trial court than an affidavit of a former juror,
21 a person who, by the way, has absolutely no interest in the sub-
22 litigation but who as a part of her civic duty and pride car-
23 ried forward at the last minute to attempt to prevent a similar
24 justice from reoccurring.

25 Next, consider the affidavit of Ada Thorley, the wife of
26 Decedent's brother and sister-in-law of each of the parties to
27 this Appeal and to the action below. Mrs. Thorley has resided
28 in Cedar City continuously for the past fifty (50) years and
29 well familiar with both of the parties to this action. Mrs.
30 Thorley testifies in relevant part:

31 "WILLIAM THORLEY is married to Bardella Thorley
32 and together they have raised five children,
33 four boys and a girl all of whom now, except
34 one, make their home in Cedar City, Utah . . .

35 WILLIAM THORLEY is a member and elder in the
36 Church of Jesus Christ of Latter Day Saints in
37 Cedar City, Utah. . . .

1 Bill is and has been for some time, a member
2 of the board of directors of the State Bank
3 of Southern Utah, one of the three major
4 banks in town.

5 Bill also owns and operates the Thorley Cattle
6 Company, a company engaged in the cattle and
7 sheep business, one of southern Utah's primary
8 industries.

9 Bill is in his own right a man of wealth and
10 is known as such by most adult members of this
11 community . . . and he is held in high esteem
12 and respect by most.

13 THOMAS J. THORLEY, on the other hand . . . is
14 not known in this community, does not reside
15 here, and does not and has not worked in this
16 community."

17 Mrs. Thorley concludes under the state of facts that in all
18 probability, Appellant herein would be prejudiced if he were to
19 have to try this case in Iron County, Utah.

20 Lastly, the affidavit of John Rowberry, citizen of Cedar City,
21 for 35 years and the person who is familiar with the parties to
22 this case. He attests to the substantial land holdings and
23 development of Mr. WILLIAM THORLEY in Cedar City, Utah, his rela-
24 tive position as elder in the church, past member of the bureau
25 of land management, and past candidate on the Republican ticket
26 for Iron County Supervisor. He, like the other affiants, concludes
that prejudice would likely result in favor of the Respondent if
the case were to proceed in Iron County.

Contrast if you will the total absence of any sworn affidavits
or statements by the Respondent or anyone on his behalf to rebut
any of the facts or testimony stated in these affidavits.

Such a trial, it is contended, could have been easily trans-
ferred to an adjoining county, such as Washington County where

1 the same district judge, the Honorable J. Harlan Burns, als
2 presides. Thus, Judge Burns being familiar with the case a
3 facts encountered in the former trial, need only have set
4 matter down for hearing in an adjoining county without the
5 disruption or judicial waste of time normally encountered b
6 changing not only the place of trial but also the presiding
7 judge.

8 The nature of the proceedings is also significant to the
9 alysis of the Court's determination. This case uniquely im
10 facts which, if proven, would have questioned and indeed im
11 the integrity of Mr. William R. Thorley. Such facts as are
12 raised in the Complaint and Contest below allege that Willia
13 Thorley perpetrated such fraud and undue influence on his d
14 brother, Lester R. Thorley, that any will executed by the
15 Decedent while he resided with his brother in Cedar City, Uta
16 was void. The Complaint alleges that William R. Thorley fur
17 prayed upon the frailties of body and mind of the Decedents
18 to cause him to execute the will under the dominant influenc
19 his brother. A local jury, under such circumstance, would i
20 probability favor the defense.

21 Nevertheless, in consideration of the above and other
22 arguments raised in the Points and Authorities submitted in
23 support of this Motion, the Court on June 28, 1977 by Order
24 the Honorable J. Harlan Burns, denied the Motion and further
25 denied the request of counsel to take the matter under advis
26 ment to consider the above affidavits which were later
the Court. See Order of the Court dated July 12, 1977, O

133 of the Designation of Record on Appeal.

III

THE RIGHT TO TRIAL BY JURY WAS
EFFECTIVELY DENIED APPELLANT
BELOW IN FAVOR OF AN ADVISORY
JURY.

As noted above in the Statement of Facts, Paragraph 6, a Motion to resolve the issue of domicile by way of a jury trial was made and filed by Appellant on or about November 23, 1975. A Memorandum of Points and Authorities in Support of that Motion was submitted at the time referring to Utah Probate Code §75-14-17 requiring all issues of fact joined in probate to be tried in conformity with the requirements of Code of Civil Procedure and Utah Probate Code §75-14-18 requiring the submission of issues of fact to the jury.

Rule 38 of the Utah Rules of Civil Procedure provides that the right to jury trial, as declared by the Constitution or as given by statute, shall be preserved to the parties and that any party may demand a trial by jury of an issue triable of right by a jury by paying the statutory fee and serving notice on the other party in writing.

Demand for Jury was filed with the District Court (Designation of Record on Appeal, Page 15) and the necessary fees posted.

Rule 39 of the Rules of Civil Procedure separates the right to trial by a jury from that of a trial by consent or advisory jury in the following respect:

"Rule 39. Trial by Jury or by the Court.

(a) By Jury. When trial by jury has been demanded as provided in Rule 38, the action shall be designated upon the register of actions as a jury action. The trial of all issues so demanded shall be by jury, unless . . .
(2) the court upon motion or on its own initiative finds that a right of trial by jury of some or all of those issues does not exist . . .

(b) By the Court. Issues not demanded for trial by jury is provided in Rule 38 shall be tried by the court . . .

(c) Advisory Jury and Trial by Consent. In all actions not triable of right by a jury the court upon motion or on its own initiative may try any issue with an advisory jury. . . ."

The right to a jury trial has been constitutionally guaranteed in the State of Utah. Article I, Section 10.

The issue of domicile, a preliminary jurisdictional issue, necessitated by virtue of the Respondent's demand in the Court below and the issue raised in the Contest after Probate filed that Court. Utah Probate Code §75-1-2 in relevant part provides a will must be proved and letters testamentary granted if the Decedent was a resident of the State, in the county in which he had his residence at the time of his death. In Utah, like California, residence is synonymous with domicile for purposes of probate jurisdiction. Estate of Glassford, 114 C.A. 2d 181, 3 P. 2d 908. California Probate Code §301 is synonymous with Utah Probate Code §75-1-2. See compiler's note.

Domicile is the location with which for legal purposes a person is considered to have the most settled and permanent connection, the place where he intends to remain and to which whenever he is absent he has the intention of returning, but which the law may assign to him constructively. Domicile is normally the more comprehensive term in that it includes both

1 act of residence and an intention to remain. Restatement,
2 Conflict of Laws, §12 (1934), Volume I Beale, Conflict of Laws,
3 §16.2 (1935); Texas v. Florida, 306 U. S. 398, 425-426 (1939).

4 In Gardner v. Gardner, 118 U. 496, 222 P.2d 1055,
5 the question concerned the domicile between Utah and California
6 for purposes of a divorce decree. There at 222 P. 2d at page 67
7 the Court held:

8 "The question of whether the plaintiff was a
9 'actual and bonafide resident' of Cache County
10 for the period prescribed by the statute . . .
11 which is raised by the first assignment of error
12 is essentially one of fact. Is the evidence
13 such that the trial court was required to find
14 that by going to and remaining in California for
15 two or three weeks, together with the attendant
16 circumstances, the parties thereby manifested
17 a present intention to live permanently or
18 indefinitely in that state? See 17 Am. Jur.,
19 Domicile, §24, Page 605, and Price v. Price,
20 156 Pa. 617, 27 A. 291." (Emphasis added).

21 In the Gardner case, the Court in answering that question as
22 to domicile, considered the following principles:

23 "Certain civil principles should be kept in mind
24 in seeking the answer to the stated question. If
25 the parties by going to California expected a
26 change of actual domicile, then per force they
thereby ceased to be actual and bonafide resi-
dents of Utah. . . . The essential fact that
raises a change of abode to a change of domicile
is the absence of any intention to live else-
where. Williamson v. Ossenton, 232 U.S. 619,
58 L. Ed. 758, and Sneed v. Sneed, 14 Ariz. 17,
123 P. 312. See also 17 Am. Jur., page 607,
609-610." Id at page 67.

27 To the same effect, the Court in Munsee v. Munsee, 12 Utah 2d
28 83, 363 P. 2d 71 (1961):
29 / / / /
30 / / / /

"What we are trying to say is that whether a person is 'actual' resident on top of his domiciliary, including, of course, his intention, is a factual matter determinable in the first instance at the trial court level."

The question of domicile whether concerned with probate jurisdiction or divorce jurisdiction employs the term "resident" and, since synonymous with domicile, is, under the above cases, a factual determination to be tried at the first instance by the trier of fact, thus invoking the provisions of §78-21-2 of the Utah Judicial Code:

"All questions of fact, where the trial is by jury, . . . are to be decided by the jury and the provisions of Rule 38 of the Utah Rules of Civil Procedure that: 'any party may demand a trial by jury of an issue triable of right by a jury by paying statutory jury fee and serving . . . a demand in writing.'"

In Stickley v. Union Pacific R. Co., 251 P. 2d 867 (Utah), the Supreme Court expresses the zealously guarded right to a jury trial in the following language:

"In our democratic system, the people are the repository of power whence the law is derived; from its initiation and creation to its final application and enforcement, the law is the expression of their will. The functioning of a cross-section of the citizenry as a jury is the method by which the people express this will in the application of law to controversies which arise under it. Both are constitutional [Constitution of Utah, Article I, §10] and statutory [104-23-5, UCA 1943; U.R.C.P. Rule 38] provisions assure trial by jury to citizens of this State.

Courts, as final arbiters of law, could arrogate to themselves arbitrary and dangerous powers by presuming to determine questions of fact which litigants have a right to have passed upon by juries. Part of the merit of the jury system is its safeguarding against such arbitrary power in the courts . . . "

1 The right to a jury trial, unlike the right to an advisory
2 jury, is clearly segregated both in statute and in law and the
3 right to a jury trial does not mean the right to an advisory
4 jury which under the latter system, gives the Court the prerogative
5 to accept or reject the jury's determination. Thus, Rule 39(c)
6 provides:

7 "In all actions not triable of right by a jury
8 the court upon motion or on its own initiative
9 may try any issue with an advisory jury . . ."
(Emphasis added).

10 In the instant action, a Motion was made in connection with
11 the Court's Order dated March 29, 1977, the Order setting the
12 matters down for trial including domiciliary hearing to be
13 followed by a trial on the merits. This Order is designated
14 on Page 48 of the Designation of Record on Appeal. In
15 relevant part, that Order states:

16 "IT IS FURTHER ORDERED that the above listed
17 matter be, and hereby is, set down for hearing
18 as to the domiciliary with advisory jury on
Monday, the 23rd day of May, 1977, to follow
the hearing on said Motions."

19 At the time of the hearing of a Motion for a Jury Trial as
20 opposed to an advisory jury, the Court denied the Motion and
21 proceeded with the jury acting in an advisory capacity by
22 submitting special interrogatories to that jury and thereafter
23 accepting the jury's determination which was encompassed within
24 the Interlocutory Judgment on jurisdiction. Designation of
25 Record on Appeal, Page 80. While the Court in the Interlocutory
26 Judgment does not distinguish between an advisory jury and a
jury, it is nevertheless fact that the Court employed the jury

1 in the advisory capacity and denied the Appellant the right,
2 jury trial.

3 CONCLUSION

4 It is requested that for the reasons stated, the judgment
5 be reversed.

6 DATED: 12/23, 1977.

7 Respectfully submitted,

8 HIGGS, FLETCHER & MACK

9
10 By Thomas E. Miller
11 Thomas E. Miller

12 DATED: Dec 27, 1977.

13 SNOW, CHRISTENSEN & MARTINEAU

14
15 By Rex E. Madsen
16 Rex E. Madsen

LAW OFFICES
HIGGS, FLETCHER & MACK
1800 HOME TOWER • 707 BROADWAY
SAN DIEGO CALIFORNIA 92112
(714) 236-1551

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17 I hereby certify that I mailed two true and correct
18 copies of Appellant's Opening Brief to Orville Isom, 78 West
19 Harding, Cedar City, Utah on the 27th day of December, 1977.

20
21 Jan Lamm
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